In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 828

WILLIAM R. LICHOTA AND EDITH F. LICHOTA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Northern District of Ohio, petitioners were convicted of mail fraud and conspiracy to commit mail fraud, in violation of 18 U.S.C. 1341 and 371. The indictment charged petitioners with a scheme to obtain money by false pretenses from the Pure Milk Association ("P.M.A.") by using Mr. Lichota's position as an employee of the association to obtain orders for a printing company created by the Lichotas, which had no employees or printing equipment, and by submitting false invoices in the name of the printing company, which Mr. Lichota authorized P.M.A. to

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pay (D.A. 7a–13a).[1] Petitioners were given suspended sentences and placed on probation for one year. The court of appeals affirmed (Pet. App. 1a–19a; 351 F. 2d 81).

1. Petitioners' main contention is that the evidence was insufficient to show fraudulent intent. This question was correctly resolved by the court below, after careful consideration of the record, and does not warrant further review.

The evidence showed that petitioners, husband and wife, were members of the Ohio bar (D.A. 173a–174a). In 1957, Mr. Lichota was hired by P.M.A. on a full-time salaried basis to handle miscellaneous legal work (G.A. 6b) and was placed in charge of its loan certificate program, which was designed to obtain capital to effectuate certain mergers (G.A. 6b–8b). In December 1958, Mr. Lichota represented to association officials that he could arrange for the printing of loan certificates, brochures and promotional material at good prices with a company in the Cleveland area (G.A. 8b–9b; D.A. 41a). He said nothing about the ownership of this company (D.A. 55a). Also in December 1958, Mrs. Lichota rented a post office box at Bedford, Ohio, in the name of "Art-Lines of Bedford," with Lucille Beznoska (Mr. Lichota's mother) and "Lawrence Bradford" (a fictitious name) authorized to receive mail (G.A. 2b–4b). In January 1959, a bank account was opened under the name of "Art-Lines of Bedford," with "Lawrence Bradford" and "Lucille

[1] Record references are to the appendices to briefs filed in the court below—"D.A." to that of the defendants and "G.A." to that of the government.

Bradford" authorized to draw checks (G.A. 33b–35b).

Between June 1959 and February 1960, P.M.A., acting upon Mr. Lichota's representations, placed at least twenty-four orders with Artlines (see Pet. App. 4a). Petitioners had the work on these orders done by the Lincoln Press, at which they were known only as the "Bradfords" (G.A. 15b–19b). They then prepared invoices for the jobs in the name of Artlines and submitted them to P.M.A. The quantities of materials actually printed by Lincoln Press and delivered to P.M.A. were overstated on the invoices, and the prices charged to P.M.A., and authorized to be paid by Mr. Lichota (G.A. 21b), were substantially higher than the charges made by Lincoln Press.[2]

As the court below properly found, the jury was entitled to find on the basis of these facts—which petitioners conceded to be true—that petitioners were engaged in a scheme to defraud P.M.A. It is well settled that the deceitful concealment of a material fact may constitute fraud. *Cacy* v. *United States,* 298 F. 2d 227, 229 (C.A. 9); *Gusow* v. *United States,* 347 F. 2d 755 (C.A. 10), certiorari denied, 382 U.S. 906.

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[2] For example, in payment of invoices submitted to it, P.M.A. issued and mailed checks to Artlines for $1545.80, ostensibly covering the cost of printing 10,000 Series F certificates (Count 1), and for $1080.00 covering the cost of 10,000 Series J loan certificates (Count 2). Actually only 6,000 loan certificates in each Series had been printed by Lincoln Press (and delivered by Artlines to P.M.A.) at a total cost to Artlines of $892.00. Similarly P.M.A. was billed, and mailed its check to Artlines, in the amount of $2,166.00 for 16,500 loan certificates, when only 10,000 loan certificates had been printed at a cost to Artlines of $789.00 (Count 3) (see G.A. 18b; 22b–25b; 27b–33b; see also G.A. 55b–60b; D.A. 139a, 200a, 206a).

And a plan to get money unfairly by obtaining and then betraying the confidence of another may be a scheme to defraud even though no falsehoods are told. *Shushan* v. *United States*, 117 F. 2d 110 (C.A. 5), certiorari denied, 313 U.S. 574.

The validity of petitioners' sole defense—good faith—was likewise properly left for resolution by the jury. Petitioners contended that the overcharges on the Artlines invoices to P.M.A. represented compensation to Mrs. Lichota for legal and artistic services, which they preferred to "absorb" into the printing costs (D.A. 139a–140a, 234–237a, 252a–255a). They further contended that they were authorized to conduct their affairs in this manner by a power of attorney purportedly executed by P.M.A. (D. Ex. H, D.A. 109a; G.A. 67b; see Pet. App. 5a). But that document cannot be read as permitting petitioners to submit false statements of the quantity or cost of printed materials delivered to P.M.A. or to conceal their true relationship to Artlines. Moreover, there was substantial evidence which cast doubt on the document's authenticity.[3]

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[3] Three of the persons whose names appear as having signed the purported power of attorney—the P.M.A. president, a witness, and the notary public—were not called to testify. The only such person called by the defense, P.M.A.'s secretary-treasurer, testified that he did not remember seeing or signing the document, although the signatures thereon appeared to be his and the president's (D.A. 109a–110a). The general manager of P.M.A. likewise had no recollection of having seen or signed the document, although the signatures appeared to be his and those of other company officials (D.A. 49a–50a). The secretary of the P.M.A. board of directors, who was the keeper of company records, was unable to find either an original or a copy of the document in company files (G.A. 41b–42b).

2. There is no merit in petitioners' objection to the introduction of evidence of three other enterprises which they created and controlled: Hellman and Connors, a fictitious law firm—described by Mr. Lichota as a trade name of his wife, the Midwest Office Service, a firm performing typing and stenographic work, and the Elton Investment Company. Mr. Lichota caused P.M.A. to retain the purported law firm to handle the development of trademarks coincident to the printing work supposedly being done by Artlines and approved invoices authorizing payments to the firm of $3000 to $4000. He channelled P.M.A. typing work to Midwest and approved payment of Midwest invoices in the amount of $4000 (D.A. 169a–177a, 178a–190a). And he induced P.M.A. to designate Elton the exclusive agent to purchase P.M.A.'s loan certificates at fifty per cent of face value (D.A. 28a, 132a, 286a).[4]

The evidence in question showed that petitioners obtained money from P.M.A. through organizations contrived for that purpose, concealing their control of such organizations. It tended to establish a general pattern of conduct sufficiently similar to the transactions at issue to be admissible on the question of criminal intent. See McCormick, *Evidence* (1954

[4] Mr Lichota testified that he wrote to Elton on behalf of P.M.A. and that it was fair to assume that any reply was written by his wife or mother (D.A. 157a–159a). A letter from Elton to P.M.A. signed with the name "R. S. Mather," dated February 13, 1961, was shown to Mr. Lichota and he explained that he did not disclose the signature was fictitious because no one asked him (D.A. 161a). There is no merit in the claim (Pet. 13) that it was error to permit reference to this letter.

ed.) § 164. Moreover, most of the evidence with respect to Elton was developed by the defense for the apparent purpose of showing affirmatively that petitioners had rendered some valid services to P.M.A. (see D.A. 32a–34a; 43a–54a; 56a–57a; 109a; 128a–132a). The evidence as to Hellman and Connors and Midwest was developed by the government on cross-examination and served to impeach Mr. Lichota's testimony that the only reason he did not disclose his relationship to Artlines was that he was not asked (D.A. 169a–190a).

3. In the course of an investigation instituted by P.M.A. officials after discovering certain suspicious transactions in the loan certificate program (G.A. 10b–14b), Mr. Lichota was interviewed in April 1961 by a private investigator, who was attempting to trace missing loan certificates (see D.A. 60a, *et seq.*). At trial, the investigator gave the following account of the interview: Mr. Lichota at first said that 15,000 certificates were missing and disclaimed having any knowledge of a "Lawrence Bradford". When confronted with a photograph of himself and his wife, identified by the printer of the loan certificates as the "Lawrence Bradfords", Mr. Lichota told the investigator that he had a "powerful lot of stuff there" but that he would "fight it," adding, "I've got the ace in the hole, I've got the 500 missing certificates" (D.A. 83a). He offered to release the certificates on condition that the company agree not to press charges against him or his wife (D.A. 63a). When asked about the 15,000 certificates he had originally mentioned, Mr. Lichota admitted they had never been printed and that Artlines was his business. He said

that the additional charges on Artlines' invoices were for artwork and "things like that" done by his wife (D.A. 83a; see generally D.A. 58a–86a; G.A. 37b–40b).

The statements he made to the investigator clearly were admissible against Mr. Lichota. He did not assert at trial, as he does now, that he was incompetent at the time of the interview. Rather, Mr. Lichota's testimony confirmed in substance the private investigator's account. Indeed, he admitted on the stand that he had told the investigator he possessed the 500 missing certificates "because [the manager of P.M.A.] had something on me, and this was my only bargaining point" (D.A. 146a). Since the statements were made in an attempt to strike a bargain on behalf of Mrs. Lichota as well, they were properly admitted against both petitioners as having been made in furtherance of the conspiracy.[5] But even if the statements were inadmissible as to the wife, their introduction would have been harmless error in light of the fact that both petitioners conceded that all of the transactions admitted by Mr. Lichota to the investigator actually took place.[6]

4. Petitioners present an isolated part of the trial court's instructions completely out of context in alleg-

[5] Contrary to petitioners (Pet. 12), the statements made in April 1961 were made prior to the termination date of the conspiracy, which was alleged to have been "on or about May 1, 1961" (D.A. 11a), and at a time when Mr. Lichota was still employed by P.M.A. (see D.A. 145a).

[6] The jury was instructed to confine its consideration to offenses charged in the indictment (G.A. 49b). Contrary to petitioners (Pet. 12–13), there is no basis for believing that the jury based its verdict on the view that petitioners were guilty of theft.

ing that the court improperly instructed that an overstatement of the quantity of printed materials delivered to P.M.A. was sufficient to form a basis for conviction. The language complained of, read in context (see G.A. 51b), reveals that the court was telling the jury that the evidence need not show any overstatement or misrepresentation in any *particular amount,* but only in some *substantial amount.* The court had previously outlined the essential elements of the crime including the need for intent to defraud (G.A. 50b), and it told the jury that every essential element must be proved beyond a reasonable doubt (G.A. 53b). There was no objection to the charge at trial. See Rule 30, Fed. R. Crim. P.

5. The closing argument of the United States Attorney was also not objected to at trial. In any event, government counsel acted well within the bounds of propriety in suggesting inferences to be drawn from the testimony casting doubt on the authenticity of the power of attorney and the authorship of other documents produced and claimed to have been prepared by Mrs. Lighota (see D.A. 266a).

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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